

Issue: Group III Written Notice with Termination (bringing contraband into facility);
Hearing Date: 12/04/15; Decision Issued: 01/21/16; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 10693; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10693

Hearing Date: December 4, 2015
Decision Issued: January 21, 2016

PROCEDURAL HISTORY

On September 8, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating the Department's policy on use of tobacco products.

On September 10, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 30, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 4, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employed Grievant as a Corrections Officer at one of its Facilities. No evidence of prior active disciplinary action was introduced at the hearing.

Grievant used smokeless tobacco. Use of tobacco products on the Facility grounds was prohibited by the Agency. He owned a box of rubber gloves which he kept in his vehicle. He wore rubber gloves when he worked on his vehicle.

On July 24, 2015, Grievant began to drive out of the driveway at his home. Officer H approached him and asked for a ride. Officer H was carrying a lunch box. Grievant agreed to take Officer H with him to the Facility.

When they arrived at the Facility's parking lot, Officer H exited the vehicle immediately and went through the Facility's entrance doors. The Major was waiting at the entrance for Grievant and Officer H. The Major had received a note from an anonymous person suggesting that Grievant, Officer H, and another corrections officer were bringing contraband to the Facility. Officer H had two rubber gloves with packets of smokeless tobacco inside them. One of the gloves was in his lunch box. The Major approached Officer H as he entered the Facility and instructed Officer H to go down a hallway to a conference room. Officer H threw one of the rubber gloves into a trash bin as he walked towards the conference room. Officer H, the Major, and Lieutenant entered the conference room. The Major asked Officer H if he would consent to a strip

search and asked if the Lieutenant could “shake down” the lunch box. Officer H said there was something in there but did not say what it was. The Lieutenant opened the lunch box and found a rubber glove with packets of smokeless tobacco inside. Officer H told the Major that the glove and tobacco were not his but he did not say to whom they belonged.

As Grievant was entering the Facility, an employee found the glove discarded by Officer H as he walked to the conference room. The glove in the trash bin contained packets of smokeless tobacco of the same brand that were in Officer H’s lunch box.

The Lieutenant approached Grievant and escorted Grievant into the conference room. The Major and Officer H were in the conference room. At some point, the Unit Manager and Sergeant S also entered the room. The Major asked Grievant and Officer H whose tobacco was in the glove removed from Officer H’s lunch box. Grievant and Officer H said the tobacco was Grievant’s. Grievant said he only used smokeless tobacco when he was on post outside of the institution. He was referring to outside of the Facility’s secured perimeter but while working on Facility grounds. They were asked about the glove found in the trash bin. Officer H said he dropped the glove in the trash bin on his way into the conference room. Officer H said the tobacco found in the glove in the trash bin was his tobacco.

Officer H was taken from the conference room into another room to be searched. While Grievant remained in the conference room, he spoke with the Unit Manager. Grievant was upset. He said, “it’s just for personal use”, referring to the tobacco. After being searched, Officer H returned to the conference room and waited with the Unit Manager. Grievant was moved to another room to be searched. Officer H was upset and told the Unit Manager he was afraid Grievant would try to “pin it (the tobacco)” on him since it was in his lunch box. Officer H said Grievant and Officer H used tobacco while outside of the secured perimeter.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”¹ Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

² Virginia Department of Corrections Operating Procedure 135.1(V)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

DOC Operating Procedure 320.6 states, “[s]moking and use of other tobacco products are prohibited on all Department of Corrections owned or leased properties including parking lots and other exterior spaces.” Smokeless tobacco would be contraband at a DOC Facility.

“Introducing or attempting to introduce contraband into a facility ...” is a Group III offense.⁴ On July 24, 2015, Grievant attempted to bring contraband (tobacco) into and use on the Agency’s Facility grounds. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant denied that the tobacco was his tobacco. He claimed it belonged to Officer H. The Agency has presented sufficient evidence to support its claim that the tobacco was Grievant’s for several reasons. First, two rubber gloves were filled with tobacco. Having two gloves instead of one filled with tobacco is consistent with setting aside tobacco for two people. Second, the rubber gloves were consistent with the type of gloves Grievant had in his vehicle. Third, Officer H admitted to bringing into the Facility the glove found in the trash bin but denied bringing in the glove found in his lunch box. If Officer H was willing to admit to bringing in the glove found in the trash bin, there would be little reason for him to deny the glove in the lunch box belonged to him, if the glove was in fact his second glove. Officer H’s statements were consistent with the tobacco in the lunch box belonging to Grievant. Fourth, Grievant admitted to using smokeless tobacco on other occasions while working at the Facility. Fifth, Grievant told the Unit Manager that the tobacco was just for personal use. All of these factors are consistent with the tobacco in the glove in the lunch box belonging to Grievant.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management”⁵ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the

⁴ DOC Operating Procedure 135.1(D)(2)(gg).

⁵ *Va. Code § 2.2-3005.*

disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁶

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.